

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BENJAMIN PONCE,

Plaintiff,

No. 2:94-cv-1630 GEB DAD P

vs.

ANA M. OLIVAREZ,

Defendant.

ORDER AND

FINDINGS AND RECOMMENDATIONS

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This is one of several actions filed in this court challenging the quality of water at Deuel Vocational Institution (DVI). By order filed February 10, 1995, this action was stayed and administratively closed pending resolution of related claims in another action, Case No. 2:94-cv-1298 GEB DAD P (hereafter “the lead case”). Those claims were resolved by order filed October 18, 2012 in the lead case. By order filed October 23, 2012, plaintiff was served with a copy of the findings and recommendations filed in the lead case together with a copy of the order of the assigned District Judge adopting those findings and recommendations and was granted fourteen days in which to file either a request for voluntary dismissal of this action or a motion to lift the stay. (Order filed Oct. 23, 2012 (ECF No. 8) at 2.) In that same order, plaintiff was advised that failure to respond to the order would result in a recommendation that this action be dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b). The fourteen day period expired and

1 plaintiff did not timely respond to the court's order. For that reason, on November 15, 2012, this
2 court issued findings and recommendations recommending that this action be dismissed pursuant
3 to Fed. R. Civ. P. 41(b). (See ECF No. 9.)

4 On November 28, 2012, plaintiff filed a motion for extension of time to respond.
5 (ECF No. 11.) By order filed April 22, 2013 (ECF No. 14), plaintiff was granted twenty days to
6 file objections to the findings and recommendations recommending that this action be dismissed.
7 On May 3, 2013, plaintiff filed a statement of reasons explaining why he wishes to continue
8 pursuing this action. (ECF No. 15.) The court construes this document filed by plaintiff as his
9 objections to the undersigned's findings and recommendations and as a motion to lift the stay of
10 this action. Good cause appearing, the findings and recommendations filed November 15, 2012
11 will be vacated and the undersigned will recommend that plaintiff's motion to lift the stay be
12 denied and that this action dismissed.

13 Plaintiff sets forth the following reasons for continuing with this action: He was
14 "unable to brush [his] teeth for weeks" or "wash [his] hands before eating" or "shower for days."
15 (Response filed May 3, 2013 (ECF No. 15) at 1.) The correctional officers brought their own
16 water and inmates couldn't drink; plaintiff had no funds to buy water. (Id.) Plaintiff "got sick"
17 and couldn't drink water until he "couldn't wait any longer." (Id.) He couldn't wash his clothes
18 and he still has "bad memories of having to drink dirty water that . . . is distressful." (Id.)
19 Plaintiff's statement is not signed under penalty of perjury and he has provided this court with no
20 evidence to support his assertions. In view of the findings made in the lead case in this action, a
21 copy of which were served on plaintiff, at this late stage plaintiff's unsworn assertions are
22 insufficient to suggest that this action should proceed further on plaintiff's challenge to the
23 quality of drinking water at DVI in the 1990s. For this reason, plaintiff's motion to lift the stay
24 should be denied and this action should be dismissed.

25 For the reasons set forth above, IT IS HEREBY ORDERED that the findings and
26 recommendations filed November 15, 2012 (ECF No. 9) are vacated; and

1 IT IS HEREBY RECOMMENDED that plaintiff's May 3, 2013 statement (ECF
2 No. 15) be construed as a motion to lift the stay of this action and, so construed, that the motion
3 be denied and this action be dismissed for the reasons set forth in the August 28, 2102 findings
4 and recommendations issued in Case No. 2:94-cv-1298 GEB DAD P as well as the order
5 adopting those findings and recommendations. (See Case No. 2:94-cv-1298 GEB DAD P, ECF
6 Nos. 297 & 302.)

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
9 days after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Such a document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
12 objections shall be filed and served within fourteen days after service of the objections. The
13 parties are advised that failure to file objections within the specified time may waive the right to
14 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: August 9, 2013.

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19 DALE A. DROZD
20 UNITED STATES MAGISTRATE JUDGE
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